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Ooi Kim Geik v Ng King Chong & Ors

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HIGH COURT (SHAH ALAM) — POST WINDING UP NO BA-28PW-114–06 OF 2022
AZMI ARIFFIN J
6 DECEMBER 2022

C

Companies and Corporations — Liquidators — Powers of liquidator — Official receiver and liquidator granted sanction for second respondent to commence legal action on behalf of third respondent against petitioner — Whether official receiver and liquidator had power to grant sanction to second respondent as contributory of third respondent

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Nation Park Sdn Bhd was a company incorporated on 4 June 1993. The shareholding of Nation Park Sdn Bhd prior to its winding up was Ooi Kim Geik ('the petitioner'), Ng King Chong ('the first respondent'), and Ng Kim Pin ('the second respondent'). The directors of Nation Park Sdn Bhd were initially Ng Kin Yong and the first respondent. After the demise of Ng Kin Yong, the directors of Nation Park Sdn Bhd were the petitioner and the first respondent. On 14 December 2016, the petitioner filed a winding up petition at the Shah Alam High Court pursuant to s 218(1)(f) and (i) of the Companies Act 1965 and the court granted the order to wind up against the third respondent and that the official receiver be appointed as the liquidator of the third respondent. Given that the third respondent had been wound up, the second respondent then instructed his solicitors, Messrs Harold & Lam Partnership, to write to the official receiver and liquidator to request them to consider taking legal proceedings against the petitioner to recover the alleged debts owed by the estate of the late Ng Kin Yong to the third respondent. Since the official receiver and liquidator refused to engage a lawyer to represent the third respondent and to initiate the said suit against the petitioner, the second respondent then instructed his solicitors to apply for the official receiver and liquidator's sanction in order for the second respondent to commence legal action on behalf of the third respondent against the petitioner to seek the remedies sought against the petitioner in the civil suit. The official receiver and liquidator granted the sanction and Messrs Harold & Lam Partnership then filed the civil suit against the petitioner. The petitioner, premised on the High Court decision in *Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors* [2022] MLJU 410, filed a striking out application seeking to strike out the writ of summons and the statement of claim against the petitioner. The second respondent filed this notice of motion to seek this court's determination on the validity of the sanction issued by the official receiver and liquidator to the second respondent or in the alternative, the

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second respondent be granted leave by this court to proceed with the civil suit on behalf of the third respondent against the petitioner.

Held, allowing the notice of motion with no order as to cost:

(1) Item (l) in Part I of the Twelfth Schedule of the Companies Act 2016 ('the CA 2016') empowered the liquidator to do all such other things as are necessary for winding up the affairs of the company and distributing its assets. Such general and wide powers given by the Parliament could also mean to include the power to issue a sanction to someone else to exercise any of those general powers subject to certain restriction imposed and supervision by the official receiver and liquidator. Item (j) of the Twelfth Schedule of the CA 2016 did allow a liquidator to appoint an agent to act for them to do any business which the official receiver and liquidator was unable to do, which included the official receiver and liquidator's inability to 'bring or defend any action or other legal proceedings in the name and on behalf of the company,' due to the reasons only known to them. In short, the Twelfth Schedule of the CA 2016 did allow the appointment or delegation to be done in the form of a sanction issued to the second respondent to initiate the civil suit against the petitioner on behalf of the third respondent and to appoint Messrs Harold & Lam Partnership to represent the third respondent in the suit. Thus, to say that the official receiver and liquidator's action of granting sanction to the second respondent was a 'wholesale delegation' of his powers was incorrect because as said the sanction to exercise such power was still subject to the supervision and control by the official receiver and liquidator (see paras 23–25).

[Bahasa Malaysia summary

Nation Park Sdn Bhd ialah sebuah syarikat yang diperbadankan pada 4 Jun 1993. Pegangan saham Nation Park Sdn Bhd sebelum penggulungannya ialah Ooi Kim Geik ('pempetisyen'), Ng King Chong ('responden pertama'), dan Ng Kim Pin ('responden kedua'). Pengarah Nation Park Sdn Bhd pada mulanya ialah Ng Kin Yong dan responden pertama. Selepas kematian Ng Kin Yong, pengarah Nation Park Sdn Bhd adalah pempetisyen dan responden pertama. Pada 14 Disember 2016, pempetisyen memfailkan petisyen penggulungan di Mahkamah Tinggi Shah Alam menurut s 218(1)(f) dan (i) Akta Syarikat 1965 dan mahkamah memberikan perintah penggulungan terhadap responden ketiga dan bahawa penerima rasmi dilantik sebagai pelikuidasi responden ketiga. Memandangkan responden ketiga telah digulung, responden kedua kemudian mengarahkan peguamnya, Tetuan Harold & Lam Partnership, untuk menulis kepada penerima rasmi dan pelikuidasi untuk meminta mereka mempertimbangkan mengambil prosiding undang-undang terhadap pempetisyen untuk mendapatkan semula hutang yang didakwa terhutang oleh harta pusaka mendiang Ng Kin Yong kepada

responden ketiga. Memandangkan penerima rasmi dan pelikuidasi enggan melibatkan peguam untuk mewakili responden ketiga dan untuk memulakan saman tersebut terhadap pempetisyen, responden kedua kemudian mengarahkan peguammya untuk memohon kebenaran penerima rasmi dan pelikuidasi bagi membolehkan responden kedua memulakan tindakan undang-undang bagi pihak responden ketiga terhadap pempetisyen untuk mendapatkan remedi yang dipohon terhadap pempetisyen dalam saman sivil. Penerima dan pelikuidasi rasmi membenarkan kebenaran itu dan Tetuan Harold & Lam Partnership kemudian memfailkan saman sivil terhadap pempetisyen. Pempetisyen, berdasarkan keputusan Mahkamah Tinggi dalam *Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors* [2022] MLJU 410, memfailkan permohonan pembatalan memohon untuk membatalkan writ saman dan pernyataan tuntutan terhadap pempetisyen. Responden kedua memfailkan notis usul ini untuk mendapatkan penentuan mahkamah ini mengenai kesahihan kebenaran yang dikeluarkan oleh penerima rasmi dan pelikuidasi kepada responden kedua atau sebagai alternatif, responden kedua diberi kebenaran oleh mahkamah ini untuk meneruskan saman sivil bagi pihak responden ketiga terhadap pempetisyen.

Diputuskan, membenarkan notis usul tanpa perintah kos:

(1) Butiran (l) dalam Bahagian I Jadual Kedua Belas Akta Syarikat 2016 ('AS 2016') memberi pelikuidasi kuasa untuk melakukan segala benda lain sebagaimana yang perlu bagi penggulungan hal ehwal syarikat dan pembahagian asetnya. Kuasa am dan luas sedemikian yang diberikan oleh Parlimen juga boleh bermakna memasukkan kuasa untuk mengeluarkan kebenaran kepada orang lain untuk melaksanakan mana-mana kuasa am tersebut tertakluk kepada sekatan tertentu yang dikenakan dan pengawasan oleh penerima rasmi dan penyelesai. Butiran (j) Jadual Kedua Belas AS 2016 telah membenarkan pelikuidasi melantik seorang ejen untuk bertindak bagi mereka untuk melakukan apa-apa urusan yang tidak dapat dilakukan oleh penerima rasmi dan pelikuidasi, yang termasuk ketidakupayaan penerima rasmi dan pelikuidasi untuk 'membawa atau mempertahankan sebarang tindakan atau prosiding undang-undang lain atas nama dan bagi pihak syarikat', atas sebab-sebab yang hanya diketahui oleh mereka. Secara ringkasnya, Jadual Kedua Belas AS 2016 membenarkan pelantikan atau delegasi dilakukan dalam bentuk kebenaran yang dikeluarkan kepada responden kedua untuk memulakan saman sivil terhadap pempetisyen bagi pihak responden ketiga dan melantik Tetuan Harold & Lam Partnership untuk mewakili responden ketiga dalam saman itu. Oleh itu, untuk mengatakan bahawa tindakan penerima rasmi dan pelikuidasi memberikan kebenaran kepada responden kedua adalah 'pewakilan borong' kuasanya adalah tidak betul kerana seperti yang dikatakan kebenaran untuk melaksanakan kuasa tersebut masih tertakluk kepada pengawasan dan kawalan oleh penerima

A rasmi dan pelikuidasi (lihat perenggan 23–25).]

Cases referred to

Ah Toy v Registrar of Companies (NT) (1986) 72 ALR 107, FC (refd)
Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors [1999] 6 MLJ 725, HC (refd)
Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd [2020] 5 MLJ 614, FC (refd)
Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd and another appeal [2021] 2 MLJ 424, CA (refd)
Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors [2017] 6 MLJ 116, CA (refd)
Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case [2022] MLJU 410, HC (refd)
Small Medium Enterprise Development Bank Malaysia Bhd v Pekan Legasi Sdn Bhd & Ors [2022] MLJU 966, HC (refd)
University of Malaya v FBSM Ctech Sdn Bhd [2018] 5 MLJ 397; [2018] 8 CLJ 71, CA (refd)
Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (folld)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 218(1)(f), (i)
Companies Act 2016 s 486, 486(1), (1)(a), (2), Twelfth Schedule, Part I, items (a), (j), (l)
Rules of Court 2012 O 92 r 4

(Bodipalar Ponnudurai De Silva) for the petitioner.
(Harold & Lam Partnership) for the second respondent.

Azmi Ariffin J:

INTRODUCTION

[1] Enclosure 2 is the second respondent (contributory of the third respondent, Nation Park Sdn Bhd (in liquidation)) notice of motion dated 7 June 2016 pursuant to ss 486(1)(a) and 486(2) of the Companies Act 2016, and/or the inherent jurisdiction of this honourable court for the following orders:

1.1 A declaration that the Sanction dated 22.3.2022 ('Sanction') issued by the Official Receiver and Liquidator of Nation Park Sdn Bhd (in liquidation) ('Nation

Park (in liquidation)') to the second respondent to initiate and/or continue with legal proceedings at the Shah Alam High Court against Ooi Kim Geik, is proper and valid;

1.2 Alternative to prayer (1) above, that the second respondent above-named, be given leave by this Honourable Court to proceed with and/or continue with the action in civil suit No BA-22NCVC-124–03 of 2022 which has been filed at the Shah Alam High Court, on behalf of Nation Park (in liquidation) against Ooi Kim Geik;

1.3 No order as to costs; and

1.4 Any other and/or further relief as deemed fit and proper by this Honourable Court.

FACTS OF THE CASE

[2] The facts of the case may be summarised as follows:

(a) Nation Park Sdn Bhd (in liquidation) was a company incorporated on 4 June 1993. The shareholding of Nation Park Sdn Bhd prior to its winding up, was as follows:

(i) Ooi Kim Geik (petitioner): 313,875 shares (77.5%);

(ii) Ng King Chong (first respondent): 60,750 shares (15%); and

(iii) Ng Kim Pin (second respondent): 30,375 shares (7.5%).

(b) the directors of Nation Park Sdn Bhd were initially Ng Kin Yong and Ng King Chong. After the demise of Ng Kin Yong, the directors of Nation Park Sdn Bhd were Ooi Kim Geik and Ng King Chong;

(c) on 14 December 2016, the petitioner filed a winding up petition at the Shah Alam High Court pursuant to ss 218(1)(f) and (i)of the Companies Act 1965;

(d) pursuant to the Court of Appeal order dated 25 May 2018, the petitioner filed the amended petition dated 20 August 2019 to include the first and second respondents to the amended winding up petition;

(e) on 13 March 2020, this honourable court granted the order to wind up against the third respondent and that the official receiver be appointed as the liquidator of the third respondent;

(f) prior to the winding up of the third respondent, the first respondent filed an application for leave to bring a derivative action against the petitioner in the name and on behalf of the third respondent at the Shah Alam High Court (Originating Summons No BA-24NCC-84–07 of 2018);

(g) nevertheless, as the third respondent was ordered to be wound up by this honourable court on 13 March 2020, the first respondent then withdrew the derivative leave application on 14 May 2020;

(h) hence, no determination was made by the Shah Alam High Court in respect of the derivative leave application;

(i) given that the third respondent had been wound up, the second respondent then instructed his solicitors, Messrs Harold & Lam Partnership, to write to the official receiver and liquidator to request them to consider taking legal proceedings against Ooi Kim Geik to recover the alleged debts owed by the estate of the late Ng Kin Yong to the third respondent (in liquidation);

(j) by way of letters dated 9 October 2020 and 16 October 2020, the second respondent solicitors wrote letters to the official receiver and liquidator and highlighted to them the wrongdoings and debts owed by the estate of the late Ng Kin Yong to the third respondent (in liquidation) and proposed to the official receiver and liquidator to engage Messrs Harold & Lam Partnership to represent the third respondent (in liquidation) to take legal action against the petitioner.

(k) nevertheless, on 3 December 2020, Jabatan Insolvensi Malaysia Cawangan Selangor replied to Messrs Harold & Lam Partnership's letter. For ease of reference, the relevant part of the said letter is reproduced below:

> 3. Selanjutnya, pada 2 December 2020, Bahagian Likuidasi Ibu Pejabat Jabatan Insolvensi Malaysia, Putrajaya, telah memberikan maklumbalas berkaitan isu/perkara tersebut dengan memaklumkan bahawa cadangan pihak peguam untuk Jabatan melantik mereka bagi meneruskan pembelaan kes di Mahkamah Tinggi Malaya di Seremban (Writ Saman No NA-22NCvC-46–06/2019) dan bagi memulakan tindakan undang-undang terhadap Ooi Kim Geik dan estet Ng Kin Yong adalah ditolak memandangkan ia adalah bertentangan dengan polisi Jabatan.
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> 4. Sehubungan itu, seperti yang telah dimaklumkan kepada pihak tuan, penyumbang syarikat mempunyai 'locus' untuk melantik pihak tuan bagi mewakili syarikat Nation Park Sdn Bhd Sekiranya pihak penyumbang ingin melantik pihak tuan, pihak penyumbang perlu mengemukakan permohonan untuk mendapatkan kebenaran (sanksi) Pelikuidasi di bawah seksyen 486 Akta Syarikat 2016 daripada Jabatan ini sepertimana merujuk kepada surat Jabatan ini bertarikh 8 September 2020 yang telah diserahkan kepada penyumbang syarikat di atas.

(l) in light of the official receiver and liquidator's refusal to engage a lawyer to represent the third respondent (in liquidation) and to initiate the said suit against the petitioner, the second respondent then instructed his solicitors to apply for the official receiver and liquidator's sanction in

order for the second respondent to commence legal action on behalf of the third respondent (in liquidation) against the petitioner to seek the remedies sought against the petitioner in the civil suit.

(m) on 22 March 2022, the official receiver and liquidator granted the sanction to the second respondent to initiate the civil suit against the petitioner on behalf of the third respondent (in liquidation) and to appoint Messrs Harold & Lam Partnership to represent the third respondent (in liquidation) in the suit. For ease of reference, the relevant part of the said letter is reproduced below:

> 2. Berdasarkan Surat Aku Janji tuan/puan bertarikh 25.2.2022 Pegawai Penerima dan Pelikuidasi (PPP) bagi syarikat Nation Park Sdn Bhd (No Syarikat: 266117-M) (dalam penggulungan) telah meluluskan kebenaran pelikuidasi ('sanksi') untuk tuan/puan memulakan dan/atau meneruskan tindakan di Mahkamah Tinggi Malaya di Shah Alam bagi No Guaman: (masih belum diperolehi) dan melantik Tetuan Harold & Leim Partnership untuk mewakili syarikat Nation Park Sdn Bhd (No Syarikat: 266117-M) (dalam penggulungan) dalam guaman tersebut tertakluk kepada syarat-syarat seperti berikut:
>
> (a) Tuan/Puan hendaklah memastikan seorang penjamin yang kompeten telah menandatangani Aku Janji Penjamin. Penjamin tersebut juga dikehendaki untuk menandatangani Bon Jaminan di pejabat Jabatan Insolvensi Malaysia Cawangan Selangor dan mendepositkan sejumlah RM5,000.00 (Ringgit Malaysia Lima Ribu Sahaja) dalam bentuk bank draf atas nama KETUA PENGARAH INSOLVENSI. Tuan/Puan juga hendaklah memastikan bahawa wang jaminan tersebut telah dibayar kepada Pegawai Penerima dan Pelikuidasi ('PPP');
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> (b) PPP atau estet syarikat yang ditadbir oleh PPP tidak akan bertanggungjawab dan tidak boleh dipertanggungjawabkan sama sekali atas apa-apa kegagalan, kerugian atau apa-apa kos yang terlibat atau yang dikenakan oleh mana-mana pihak yang terlibat dalam guaman dan/atau yang berbangkit daripada guaman tersebut/kos guaman;
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> (c) Apa-apa kos (sekiranya ada) akan ditanggung sepenuhnya oleh penjamin sebagaimana yang telah dinyatakan dalam Aku Janji Penjamin yang bertarikh 25.2.2022;
>
> (d) Peguam yang mengendalikan kes hendaklah memaklumkan kepada PPP perkembangan kes tersebut dari semasa ke semasa secara bertulis;
>
> (e) Sekiranya terdapat penukaran peguam dan firma guaman oleh penyumbang, peguam yang telah diberi kebenaran pelikuidasi ('sanksi') oleh PPP bagi mewakili syarikat hendaklah memaklumkan berkenaan penukaran ini kepada PPP secara bertulis. Lanjutan itu, penyumbang syarikat dikehendaki untuk

memohon kebenaran pelikuidasi ('sanksi') yang baru kepada PPP sebelum apa-apa tindakan guaman dimulakan dan/atau diteruskan di mahkamah oleh peguam dan firm a guaman yang baru;

(f) Peguam yang mengendalikan kes hendaklah memaklumkan kepada PPP sekiranya ingin merayu. Bagi setiap peringkat prosiding/rayuan, kebenaran pelikuidasi ('sanksi') yang baru hendaklah dimohon oleh penyumbang kepada PPP. Permohonan tersebut akan dipertimbangkan oleh PPP tertakluk kepada syarat-syarat Bon Jaminan dan Aku Janji Penjamin; dan

(g) Sekiranya keputusan mahkamah dalam tindakan guaman tersebut memihak kepada syarikat, apa-apa wang, pampasan dan faedah yang diterima oleh syarikat hendaklah diserahkan kepada PPP untuk dimasukkan ke dalam estet syarikat gulung bagi faedah para pemiutang.

(n) premised on the sanction granted by the liquidator, on 24 March 2022, Messrs Harold & Lam Partnership then filed the civil suit against the petitioner;

(o) on 25 May 2022, the petitioner filed a striking out application seeking to strike out the writ of summons dated 24 March 2022 and the statement of claim dated 24 March 2022 against the petitioner on the grounds of, among others, as follows:

(i) the granting of sanction by the official receiver and liquidator is unsustainable in law;

(ii) the official receiver and liquidator has no authority to delegate his power and to grant sanction to the second respondent as contributory of the third respondent (in liquidation) to appoint solicitor to represent the second respondent and to commence this action in the name of the third respondent (in liquidation); and

(iii) the sanction given by the official receiver and liquidator to the contributory is null and void and the contributory has no locus standi to commence this action in the name of the third respondent (in liquidation).

(p) the striking out application is fixed for hearing on 9 September 2022. The hearing date of the striking out application was rescheduied to allow the current motion to be heard first and decided by this honourable court;

(q) the striking out application filed by the petitioner in the civil suit is essentially premised on the recent Kuala Lumpur High Court decision in *Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case* [2022] MLJU 410 when the

court held that:

(i) a liquidator/official receiver of a wound up company does not have power to issue a sanction or delegate his power under Item (a) of the Twelfth Schedule of the Companies Act 2016 to bring, continue with or defend any action or other legal proceedings in the name and on behalf of that company to any other person, even a creditor or contributory; and

(ii) in order for a creditor or contributory to bring, continue with or defend any action in the name and on behalf of a wound up company, the contributory can apply to court for an order to compel the liquidator/official receiver to do so, or for a court-sanction to allow the creditor or contributory to do so in the liquidator/official receiver's stead.

(r) in light of the case of *Oren Venture* case well as the striking out application, the second respondent instructed her solicitors to obtain the official receiver and liquidator's clarification and advice vis a vis the validity of the sanction;

(s) by letter dated 24 May 2022, the second respondent's solicitors wrote to the official receiver and liquidator to ascertain their position regarding the sanction. In the same letter, the second respondent's solicitors also sought confirmation from the official receiver and liquidator as to whether they are minded to represent the third respondent (in liquidation) to continue with the civil suit;

(t) the official receiver and liquidator then reply to the second respondent's solicitors via letter dated 1 June 2022. For ease of reference, the relevant part of the said letter is reproduced below:

(i) Untuk makluman tuan, merujuk kepada surat Jabatan ini bertarikh 22/3/2022, Pegawai Penerima dan Pelikuidasi bagi syarikat Nation Park Sdn Bhd (dalam penggulungan) telah meluluskan kebenaran pelikuidasi ('sanksi') untuk tuan/puan memulakan dan/atau meneruskan tindakan di Mahkamah Tinggi Malaya di Shah Alam bagi No Guaman dan melantik Tetuan Harold & Lam Partnership untuk mewakili syarikat Nation Park Sdn Bhd (dalam penggulungan) dalam guaman tersebut tertakluk kepada syarat-syarat sepertimana merujuk kepada surat bertarikh 22/3/2022 tersebut.

(ii) Pihak kami mengambil maklum akan perkara yang dibangkitkan oleh pihak tuan di perenggan tiga (3) surat tuan bertarikh 24/5/2022. Walaubagaimanapun sehingga tarikh surat ini dikeluarkan, arahan berkaitan kebenaran Pelikuidasi yang dikeluarkan oleh Jabatan Insolvensi Malaysia adalah masih berkuatkuasa sehingga dimaklumkan/diarahkan sebaliknya.

(iii) Sehubungan itu, kebenaran Pelikuidasi/sanksi yang telah diberikan kepada syarikat di atas dengan merujuk kepada surat bertarikh 22/3/2022 adalah masih terpakai sehingga kins dan pihak tuan boleh meneruskan untuk mewakili syarikat dalam tindakan Guaman Sivil No BA-22NCvC-124–03/2022.

(u) in view of this predicament faced by the second respondent that has prejudicial impact on the third respondent (in liquidation) to continue with the civil suit, on 7 June 2022, the second respondent filed the present notice of motion to seek this honourable court's determination on the validity of the sanction dated 22 March 2022 issued by the official receiver and liquidator to the second respondent or in the alternative, the second respondent be granted leave by this honourable court to proceed with the civil suit on behalf of the third respondent (in liquidation) against the petitioner; and

(v) so much for the factual background.

THE RELEVANT PROVISIONS OF LAW

[3] The provision of the law applicable are as follows:

(a) s 486(1)(a) of the Companies Act 2016 states:

> 486 Powers of liquidator in winding up by Court.
>
> (1) Where a company is being wound up by the Court, the liquidator may —
>
> (a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule, and
>
> (b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.

(b) Part I of the Twelfth Schedule Companies Act 2016 lists down the powers of a liquidator:

> Powers exercisable without authority (Section 472)
>
> The liquidator may —
>
> (a) bring or defend any action or other legal proceedings in the name and behalf of the company;
>
> (b) compromise any debt due to the company other than calls and liabilities for calls and a debt where the amount claimed by the company to be due to the company does not exceed ten thousand ringgit;
>
> (c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole immovable and movable property and things to any person or company or to sell the same in parcels;
>
> (d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary, the company's seal;
>
> (e) prove rank and claim in the bankruptcy of any contributory or debtor

for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor' and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purposes of enablinq the liquidator to take out the letters of administration or recover the money, be deemed due to the liquidator;

(i) make any payment as necessary in carrying on the affairs of the company in its ordinary course of business including payment of utility bills, statutory fees and all other such payments;

(j) appoint an agent to do any business which the liquidator is unable to do;

(k) appoint an advocate to assist him in his duties; and

(l) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

(c) s 486(2) of the Companies Act 2016 states:

486 Powers of liquidator in winding up by Court.

(2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

(d) O 92 r 4 of the Rules of Court 2012 states:

4 Inherent powers of the Court

For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

ISSUES FOR DETERMINATION

[4] Issues for determination are:

(a) whether the official receiver and liquidator has the power to grant sanction to the second respondent as the contributory of the third respondent (in liquidation); and

(b) whether the sanction granted by the official receiver and liquidator to the second respondent is valid and proper.

FINDINGS OF THIS COURT

[5] The crux of the matter before this honourable court relates to the sanction that was issued by official receiver and liquidator. Hence, it is pertinent for me to ventilate and decide on this critical issue.

[6] The main issue for determination is whether the official receiver and liquidator have the power under the Companies Act 2016 to grant sanction to the contributory of the third respondent (in liquidation) to appoint solicitor to represent the second respondent and to commence this action in the name of the third respondent (in liquidation).

[7] The stand taken by the second respondent is that once a company is wound up, the assets and liabilities of the wound up company vest in the liquidator and item (l) of the Twelfth Schedule Companies Act 2016 does empower the official receiver and liquidator to do all such other things as are necessary for winding up the affairs of the company and distributing its assets which includes to the power to issue sanction to the second respondent to initiate and/or continue with the legal proceedings at the Shah Alam High Court against the petitioner on behalf and in the name of the third respondent (in liquidation).

[8] To support his view in this regard, the second respondent relied on Federal Court case of *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614 where the Federal Court held as follows:

> ... Accordingly, if a creditor or contributory of the wound up company wishes to bring or process with an action, the creditor or contributory must apply to the liquidator for his sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound up company's action is dismissed, the liquidators usually imposes conditions (such as indemnities and guarantees) which much be satisfied by the creditor or contributory, as the case may be, before the sanction is given.

[9] The second respondent also referred to the Court of Appeal case of *Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd and another appeal* [2021] 2 MLJ 424 where the court held as follows:

> [41] It is also trite law as pointed out by the learned trial judge that once a company is wound up, the property, assets and rights of the company are vested with the liquidator. Only the liquidator has the right to bring an action (subject to the argument on the absolute assignment). The liquidator can grant sanction to a creditor or contributory under s 486 and the Twelveth Schedule of the Companies Act 2016 (previously s 236 Companies Act 1965) to commence or defend an action.

[10] In addition to that, the second respondent also submits that the official receiver and liquidator's action of granting the sanction cannot be described as a 'wholesale delegation' of his powers as alleged by the petitioner. This is because the sanction granted by the official receiver and liquidator to the second respondent came with certain conditions and the sanction granted was specifically for the purpose of initiating the civil suit against the petitioner.

[11] At this juncture, it is also perhaps pertinent to draw the parties attention to the Federal Court of Australia case of *Ah Toy v Registrar of Companies (NT)* (1986) 72 ALR 107, where the second respondent submitted that the said case had to be distinguished because in that particular case there was a total delegation of the liquidator's duties and powers, and not just specific tasks. Hence there is no binding effect on this honourable court.

[12] To strengthened his submission, the learned counsel for the second respondent argued that the Federal Court in the case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 recognised the fact that the court has the power to authorise someone other than the liquidator to institute, continue or defend proceedings, and such a need would arise where the liquidator refuses to do so and declines authority. Nevertheless, the Federal Court at para [19] further held as follows:

> But where, as here, the liquidator grants authorisation, there is no necessity to move the court once authority has been given either by the liquidator or the by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question.

[13] However, it was further said that the High Court in the *Oren Venture*'s case have taken a different stand from the position taken in the *Zaitun Marketing Sdn Bhd*'s case, where the High Court amongst others held as follows:

> [41] With all humility and respect based on the above which points to there being no liquidator's 'sanction' under the Act, I am unable to agree with the words in bold in those sentences. They are incompatible with the principle that a liquidator only has and can only exercise those powers that the Act expressly gives him.

[14] That being the case, the second respondent had thus invited this honourable court to depart from the High Court's decisions in *Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case* [2022] MLJU 410 and in another case of *Small Medium Enterprise Development Bank Malaysia Bhd v Pekan Legasi Sdn Bhd & Ors* [2022] MLJU 966 because it was said that reasoning made, with respect, is entirely inaccurate and the learned judicial commissioner has also failed to consider that Twelfth Schedule of Companies Act 2016 does empower the liquidator to '(f) do all such other things as are necessaty for winding up the affairs of the company and distributing its assets'.

[15] On this basis, the second respondent submit that as the purpose of the civil suit is to recover assets of third respondent (in liquidation) for the benefit of its creditors and contributories, hence it is within the official receiver and liquidator's power under Companies Act 2016 to sanction the second respondent in her capacity as a contributory to commence the suit in the name of third respondent (in liquidation) against the petitioner. Thus, the sanction granted by the official receiver and liquidator to the second respondent is valid and proper.

[16] In opposing the application by the second respondent, the petitioner argued that the 'sanction' supposedly granted in the letter dated 22 March 2022 is not valid and proper because the official receiver and liquidator in the first place does not have the power or authority to delegate the power, to bring or defend an action on behalf of a wound up company to a contributory by way of 'sanction'. Furthermore, the letter dated 1 June 2022 from the official receiver and liquidator claiming that official receiver and liquidator has the power to issue sanction should have no bearing on this honourable court as it has acted in excess of his powers given to him by the Companies Act 2016.

[17] As previously mentioned, reference is made to two High Court case of *Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case* [2022] MLJU 410 ('Oren Venture') and the case of *Small Medium Enterprise Development Bank Malaysia Bhd v Pekan Legasi Sdn Bhd & Ors* [2022] MLJU 966 ('Pekan Legasi'), where in both the cases, the High Court has decided that a liquidator has no authority or power to issue sanction to a contributory to commence an action on behalf of a wound up company.

[18] In the *Oren Venture*'s case, the issue before the High Court was whether the liquidator had powers to issue sanction to delegate his powers under item (a) of the Twelfth Schedule Companies Act 2016, to bring or defend any action or other legal proceedings in the name and on behalf of the company.

[19] It was held in the *Oren Venture*'s case that the Act does not expressly clothe the liquidator with authority to delegate his powers and to grant sanction to the contributory. His Lordship relied on the case of *Kosmopolitan Credit & Leasing Sdn Bhd v Yeo Heng Heang & Ors* [1999] 6 MLJ 725 and the Federal Court of Australia case of *Ah Toy v Registrar of Companies (NT)* (1986) 72 ALR 107. The excerpt referred to in *Kosmopolitan Credit* is as follows:

> ... The power of instituting any suit is at the discretion of the liquidator (see s 236(a)) — the power is his and he cannot delegate it. Although a general provision, s 236(2)(i), allows a liquidator to appoint an agent to do any business, it is for business which the liquidator is unable to do himself, but that cannot override the specific provision of s 236(2)(a) giving him power 'to bring or defend any action or other legal proceeding in the name of or on behalf of the company.

[20] In addition, the petitioner also relied on the Federal Court case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 and reiterated by the Court of Appeal in *Small Medium Enterprise Development Bank Malaysia Bhd v Blackrock Corp Sdn Bhd & Ors* [2017] 6 MLJ 116 where it was held as follows:

> The powers to conduct the affairs of the wound up company, including the power to institute legal proceedings is vested in the liquidator.
>
> *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 dearly outlined the fundamental principle that once a company is in liquidation its assets and liabilities vest in the liquidator. It is left to the liquidator as to how to proceed with any legal proceedings.

[21] The petitioner also referred to the case of *University of Malaya v FBSM Ctech Sdn Bhd* [2018] 5 MLJ 397; [2018] 8 CLJ 71 where Rohana Yusof JCA (as she then was) held as follows:

> There is no law that says a liquidator's powers as contained in s 236 of the Companies Act 1965 can allow a liquidator to 'sanction' a creditor to take out an action for an on behalf of a wound up company (see s 236(3) of the Companies Act 1965). In this regard, we found the learned trial judge had failed to appreciate what sanction is, and the ambit of the liquidator's powers under the Companies Act ...
>
> The law relating to companies' liquidation does not empower a liquidator to sanction any creditor to sue on behalf of a company in liquidation.

[22] Hence, the petitioner submitted that, the official receiver and liquidator's sanction is invalid, null and void due to the official receiver and liquidator incapacity to delegate its powers under statutory law, ie s 486(1) and the Twelfth Schedule of the Companies Act 2016.

[23] I have considered the oral and written submission by both parties and

the authorities cited. But if one were to peruse the judgment in the *Oren Venture* and *the Pekan legasi* case, it appears to me that the learned judicial commissioner has not made any reference to item (l) in Part I of the Twelfth Schedule Companies Act 2016 which in clear terms empower the liquidator to do all such other things as are necessary for winding up the affairs of the company and distributing its assets. To me, such general and wide powers given by the Parliament can also mean to include the power to issue a sanction to someone else to exercise any of those general powers subject to certain restriction imposed and supervision by the official receiver and liquidator.

[24] I am fully conscious of the fact that s 486 and the Twelfth Schedule of the Companies Act 2016 does not expressly provide for an official receiver and liquidator's sanction. However,item (j) of the Twelfth Schedule Companies Act 2016 does allows a liquidator to appoint an agent to act for them to do any business which the official receiver and liquidator is unable to do, which this to me includes the official receiver and liquidator's inability to' bring or defend any action or other legal proceedings in the name and on behalf of the company, 'due to the reasons only known to them.

[25] It is important to emphasised that the word 'the liquidator may' and not 'shall' was used at the beginning part of the Twelfth Schedule clearly show that it is only directory and not a mandatory requirement for the official receiver and liquidator to act in his personal capacity in bringing or defending any action or other legal proceedings in the name and on behalf of the company. In short, the Twelfth Schedule does allow the appointment or delegation to be done in the form of a sanction issued to the second respondent to initiate the civil suit against the petitioner on behalf of the third respondent (in liquidation) and to appoint Messrs Harold & Lam Partnership to represent the third respondent (in liquidation) in the suit, herein 'tertakluk kepada syarat-syarat sepertimana merujuk kepada surat bertarikh 22 March 2022 tersebut'. Thus, to say that the official receiver and liquidator's action of granting sanction to the second respondent is a 'wholesale delegation' of his powers is, with respect, is incorrect because as said the sanction to exercise such power is still subject to the supervision and control by the official receiver and liquidator.

[26] In this context, let it be repeated that one must not lose sight the case which is directly on point none other than the Federal Court decision in the case of *Zaitun Marketing Sdn Bhd*, which I am certainly bound to follow, where the court had this to say:

> [10] An important aspect of the duties of a liquidator is to recover debts and properties due to the company as well as to assert its rights. This would more often than not involve proceeding in courts. He is also obliged to defend proceedings brought against the company. Again, these proceedings could be claims for monies

and other assets of the company. The liquidator must appoint an advocate and solicitor to act for them in these cases. The appointment of an advocate is necessary to represent him in court. The Rules of the High Court require a company to be represented in court by an advocate. The question is whether an appointment for this purpose also requires the sanction or consent of the court I do not think so. it is quite obvious that an advocate needs to be appointed when it involves proceedings in court.

It was further held by the learned Federal Court judge that:

[19] Of course, resort to the court's power to authorise someone other than the liquidator to institute, continue or defend proceedings only arises where the liquidator refuses to do so and declines authority. But where, as here, the liquidator grants authorisation, there is no necessity to move the court. Once authority is given either by the liquidator or by the court, the person authorised may appoint counsel of his or her choice to prosecute the proceedings in question.

[27] Following thereto, the Federal Court in the case of *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614 held as follows:

[20] Similarly, if a company is wound up by an order of court, the board of directors becomes functus officio. The management of the company is vested in the liquidator. Only the liquidator has the power under the 2016 Act to bring or defend any action or other legal proceedings in the name and on behalf of the company. A creditor or contributory cannot commence or continue with any action in the name of the wound up company. Accordingly, if a creditor or contributory of the wound up company wishes to bring or proceed with an action, the creditor or contributory must apply to the liquidator for his sanction to do so. In order to ensure that the defendant is not prejudiced in the event that the wound up company's action is dismissed, the liquidators usually imposes conditions (such as indemnities and quarantees) which must be satisfied by the creditor or contributory, as the case may be, before the sanction is given.

CONCLUSION

[28] It must once be emphasised that at the end of the day, the correct approach must still be that this honourable court must focus its mind to the critical issue of whether or not the official receiver and liquidator has the power to issue sanction or delegate such power under item (a) of the Twelfth Schedule of the Companies Act 2016. From the evidence presented and in line with the principles enunciated in the *Zaitun Marketing Sdn Bhd*, it is crystal clear that the question posed must certainly be answer in the affirmative.

[29] Hence, the sanction dated 22 March 2022 issued by the official receiver and liquidator of Nation Park Sdn Bhd (in liquidation) to the second

respondent to initiate and/or continue with legal proceedings at the Shah Alam High Court against the petitioner is proper and valid. I have no hesitation in arriving to such a conclusion.

[30] Notice of motion in encl 2 is allowed with no order as to costs.

[31] In view of the findings given above, I find there is no necessity to dwell on the alternative prayer at para 1.2 of the motion as it is no longer a concern to this court.

Notice of motion allowed with no order as to cost.

Reported by Ahmad Ismail